KOH TECK HEE

v.

LEOW SWEE LIM

HIGH COURT, SINGAPORE
KS RAJAH JC
[M.C. SUIT NO. 19706 OF 1986]
1 AUGUST 1991

CIVIL PROCEDURE: *Order to file list of documents - Failure to do so - Argument that practice in Subordinate Courts not to file such list - Failure to comply with requirements for discovery - Consequences - Subordinate Courts Rules 1986 [Sing], O. 24 rr. 5, 6.*

SALE OF GOODS: *Privity - Seller and buyer - Payment by cash cheque - Invoice number and payer's name written on reverse of cheque - Acknowledgment of cheque - Duty to fill cheque up properly.*

The defendant had ordered goods from WT, who acted as the plaintiff's broker. The goods were delivered on the same day. The defendant gave a cash cheque as payment. Receipt of the cheque was acknowledged by the plaintiff on his invoice which was given to the defendant. The cheque had 2 tiny faint pencil lines drawn on the left hand corner of the cheque which can be missed unless looked for carefully. The words "Lay Pheng Trading Co." and the figure "1075" were written on the reverse side of the cheque but were not noticed by the plaintiff when he received the cheque from the defendant. The plaintiff noticed the words and figure when he banked the cheque on the same day after indorsing his firm's name and account number. When the plaintiff presented it for payment, it was dishonoured because the defendant had instructed the bank to stop payment. Further, the drawer's seal was stated to be irregular as the seal on the cheque was Ming Teck Hui Garments; it should have been Ming Teck Hui Garments &Trading Co.

The defendant contended fraud and duress in relation to the invoice which described the plaintiff as the seller, the defendant as the buyer and WT as a witness, arguing that as far as he was concerned, he was only dealing with WT and that the goods were first sold to Lay Pheng Trading Co. and then resold to the defendant by the company.

The defendant argued that the plaintiff's failure to call WT should result in an adverse inference being drawn against the plaintiff.

The defendant's Counsel further submitted that the presence of the words "Lay Pheng Trading Co." and the invoice no. "1075" of Lay Pheng Trading Co. written contemporaneously on the reverse side of the defendant's cheque were critical to the defence case; however the Magistrate refused to admit the invoice in evidence. The Magistrate awarded judgment to the plaintiff; hence this appeal.

The parties were also ordered to file list of documents and verifying affidavit within a specific time period. The defendant did not file a list of documents as ordered, arguing that there is a practice in the Subordinate Courts for both parties not to file a list of documents and an affidavit verifying the list notwithstanding the order of Court.

Held:

[1] There was sufficient evidence, oral and documentary, in respect of the plaintiff's case to support the Magistrate's decision and finding of fact.

[2] If the defendant had wanted to pay somebody else and not the plaintiff, he should have written the payee's name on the face of the cheque instead of drawing a cash cheque and writing the payee's name on the reverse side of the cheque. There was a contractual relationship between the plaintiff and the defendant. Regardless of whether or not there was a duty on the part of the defendant to fill up his cheque properly when it left his hands as a signed document, it was reasonable for the plaintiff to acknowledge the cheque on the basis that the cheque was properly filled up and was a properly signed documents when he acknowledged receipt of the cheque.

[3] The order of a Court to file a list of documents with an affidavit verifying the list of documents is not subject to any practice. A party's bundle of documents produced at the trial is no substitute for failure to comply with requirements for discovery. Order 24 r. 16 of the Subordinate Courts Rules 1986 sets out the consequences. The consequences can be serious for both litigant and solicitor.

[4] The absence of WT made no difference to the plaintiff's case. The defendant was unable to show that the Magistrate was wrong in his decision.

[Appeal dismissed with costs.]

Cases referred to:
London Joint Stock Bank Ltd. v. Macmillan [1918] AC 777 ***(foll)***
*Rockwell Machine Tool Co. v. EP Barrus (Concessionaires) [1968] 1 WLR 693****(cons)***

Legislation referred to:
Subordinate Courts Rules 1986 [Sing], O. 24 r. 5, r. 16, O. 27 r. 4

Other sources referred to:
Halsbury's Laws of England, 4th Edn., Vol. 41

For the plaintiff/respondent - C H Chua
For the defendant/appellant - R S Bajwa

JUDGMENT

KS Rajah JC:

This is an appeal against the decision of the Magistrate who awarded final judgment to the plaintiff. The plaintiff claimed $5,109.60 from the defendant, being the balance due to him for the price of goods sold and delivered or in the alternative, resting his claim on an account stated.

On 18 June 1986, the defendant ordered certain textile goods from one William Teo who acted as a broker for the plaintiff in the sale of the goods. The plaintiff delivered the goods to the defendant's premises on 18 June 1986. Upon receipt of the goods, the defendant drew a Tat Lee Bank "cash" cheque dated 18 June 1986 for $8,586.30 as payment for the goods. Receipt of the cheque was acknowledged by the plaintiff on his invoice which was given to the defendant. The cheque had 2 tiny faint pencil lines drawn on the left hand corner of the cheque which can be missed unless looked for carefully. The words "Lay Pheng Trading Co." and the figure "1075" were written on the reverse side of the cheque but were not noticed by the plaintiff when he received the cheque from the defendant. The plaintiff noticed the words and figure when he banked the cheque on the same day after indorsing his firm's name and account number.

The defendant instructed his bank to stop payment on the cheque. When the bank returned the cheque to the plaintiff, the bank gave an additional reason "Drawer's seal irregular". The bank did not honour the cheque because payment was stopped and because the "Drawer's seal was irregular". The seal on the cheque was "Mui Teck Heng Garments". It should have been "Mui Teck Heng Garments & Trading Co". Three words were omitted.

The learned Magistrate carefully examined the relationship between the parties and found as a fact that William Teo was engaged as a broker by the plaintiff to sell the plaintiff's goods to the defendant.

The learned Magistrate refused to admit in evidence invoice no. 1075 allegedly issued by Lay Pheng Trading Co. to the defendant on 18 June 1986 when the plaintiff objected to the document being admitted as evidence on the ground that the maker of the invoice, William Teo, was not called, since the truth of its contents was disputed. William Teo was present in Court when the Court first started hearing the case. He was identified by the plaintiff. Two days after the hearing began, however, William Teo, who owed a sum of $3,943 to the defendant, did not appear in Court. The plaintiff's attempts to contact William Teo thereafter were not successful. The plaintiff served early notice that he had decided not to call William Teo.

The learned Magistrate considered the argument put forward by the defendant that the defendant had only dealt with William Teo of Lay Pheng Trading Co. and that it had never occurred to the defendant that the defendant was dealing with the plaintiff. The learned Magistrate noted that the defendant relied on the words "Lay Pheng Trading Co." and the figure "1075" written on the reverse side of the defendant's cash cheque. Fraud and duress was alleged by the defendant with respect to the preparation of the document (P4) which described the plaintiff as the "seller", the defendant as the "buyer" and "Lay Pheng Trading Co." as a "witness". William Teo signed for Lay Pheng Trading Co. The learned Magistrate who heard and saw the witnesses did not accept the defendant's story that the goods were first sold to Lay Pheng Trading Co. and then resold to the defendant by Lay Pheng Trading Co. There was a conflict of evidence as to whom the cheque was given and the circumstances leading to the return of part of the goods. There was also a conflict of evidence as to how the document "P4" came to be prepared. The learned Magistrate accepted the plaintiff's version of the events as having been proved on a balance of probabilities and awarded judgment to the plaintiff.

The Defendant's Case

Counsel for the defendant argued that the plaintiff should have called William Teo to give evidence to establish privity of contract between the plaintiff and the defendant. It was argued by Counsel that since the plaintiff did not call William Teo, it was probable that William Teo's evidence would not be in the plaintiff's favour. Adverse inferences against the plaintiff should have been drawn. The learned Magistrate erred.

The defendant's Counsel further submitted that the presence of the words "Lay Pheng Trading Co." and the Invoice No. "1075" of Lay Pheng Trading Co. written contemporaneously on the reverse side of the defendant's cheque were critical to the defence case which, he argued, the Court below failed to adequately consider.

Before the learned Magistrate, the defendant gave evidence as follows:

> Whenever I make payment I always write the payee's name on the reverse side of the cheque. The sum of $8,586.30 was therefore made in favour of Lay Pheng Trading Co.

During the appeal, no satisfactory explanation was given for writing the payee's name on the reverse side of the cheque when "Lay Pheng Trading Co." could have been made the payee of the cheque and the cheque properly signed since it was written contemporaneously with the drawing of the 'cash' cheque. Counsel submitted that the plaintiff's invoice was a unilateral document. Lay Pheng Trading Co's Invoice No. 1075, however, he argued proved that Lay Pheng Trading Co. was the seller and not the plaintiff. The document (P4) which describes the plaintiff as the "seller", the defendant as the "buyer" and Lay Pheng as a "witness" was brushed aside as a dubious and unnecessary document and that therefore the plaintiff and the defendant were not parties to the contract.

Subject to the provisions of the Sale of Goods Act, a contract of sale may be in writing, either with or without seal, or by word of mouth or partly in writing and partly by word of mouth or may be implied from the conduct of the parties. (*Halsbury's Laws of England* 4th Edn., Vol. 41, para. 643.) There was credible oral and documentary evidence in support of the plaintiff's case to support the learned Magistrate's decision and findings of fact.

A customer of a bank has a duty to write cheques carefully so as not to facilitate fraud. In *London Joint Stock Bank Ltd. v. Macmillan* [1918] AC 777, Lord Shaw of Dunfermline stated at p. 826 the duty in the following terms:

> That duty is to fill up his cheque so that when it leaves his hands a signed document it shall be properly and fully filled up, so that tampering with its contents or filling in a sum different from what the customer meant it to cover shall be prevented.

If the defendant intended payment to be made to Lay Pheng Trading Co., the defendant should have written the words "Lay Pheng Trading Co." on the face of the cheque instead of drawing a cash cheque and writing the payee's name on the reverse side of the cheque. When the cheque left the defendant as a signed document, it was not properly filled up as three words were missing.

This is not a case involving a bank and its customer. The duty to the bank arises from the contractual relationship between bank and customer. There was a contractual relationship between the plaintiff and the defendant. Regardless of whether or not there was a duty on the part of the defendant to fill up his cheque properly when it left his hands as a signed document, it was reasonable for the plaintiff to acknowledge the cheque on the basis that the cheque was properly filled up and was a properly signed document when he acknowledged receipt of the cheque.

There is however, another matter that was raised in the course of defendant's arguments which must be addressed.

On 24 September 1987, the Court ordered the parties within 14 days to serve on each other a list of documents and file an affidavit verifying such list. The plaintiff filed his list of documents on 29 July 1988. The defendant's consent for filing the list out of time was obtained. The list included, among other documents:

(a) the plaintiff's invoice no. 1932 to the defendant dated 18 June 1986 (P1) on which the receipt of the cheque was acknowledged by the plaintiff;

(b) the defendant's cheque, signed "Mui Teck Heng Garments" stamped "payment stopped" (P2);

(c) a cheque returned slip from Tat Lee Bank (P2A) with the bank's reasons;

(d) a voucher stating that a commission of $252 had been paid by the plaintiff to Lay Pheng Trading Co. for selling the plaintiffs goods to the defendant on 18 June 1986 (P3); and

(e) a photostat copy of the statement where the defendant was described as the "buyer", the plaintiff as the "seller" and William Teo as a "witness" under "Lay Pheng Trading Co." The plaintiff, defendant and William Teo signed under the headings "seller, buyer and witness" (P4).

The defendant did not file a list of documents as ordered. The defendant produced a defendant's bundle of documents at the trial. At the appeal, in connection with the defendant's invoice no. 1075 of Lay Pheng Trading Co., the defendant submitted that there is a practice in the Subordinate Courts for both parties not to file a list of documents and an affidavit verifying the list notwithstanding the order of Court.

Filing A List Of Documents

Order 24 r. 5 of the Subordinate Courts Rules, 1986, requires a list of documents to be in the form set out in Schedule A to the Rules.

A list of documents takes effect as a notice to admit. By O. 27 r. 4 a party is deemed to accept the authenticity of every document contained in his adversary's list of documents save in the following circumstances:

(a) if the authenticity of the document has been denied in the pleadings;

(b) the Court otherwise orders; and

(c) if within 14 days after inspection, a notice of non-admission is served.

The party is also deemed to admit that the document was written or executed on the date it purports to have been written or executed. Similarly, he is deemed to admit that any document described as a copy is a true copy. The rule is not concerned with admissibility. Admitting the authenticity of the document does not deprive a party of the opportunity of objecting to its admissibility in evidence.

The law requires solicitors to take positive steps to ensure that his client is aware of the precise scope of the obligation to make a full and proper discovery. In *Rockwell Machine Tool Co. v. EP Barrus (Concessionaires)* [1968] 1 WLR 693, at 694, Megarry J said:

> It seems to me necessary for solicitors to take positive steps to ensure that their clients appreciate at an early stage of the litigation, promptly after (the) writ (is) issued, not only the duty of discovery and its width but also the importance of not destroying documents which might by possibility have to be disclosed. This burden extends, in my judgment, to taking steps to ensure that in any corporate organisation knowledge of this burden is passed on to any who may be affected by it.

Practice

The short answer to the practice is that the defendant did not follow the rules. The order of Court to file a list of documents with an affidavit verifying the list of documents is not subject to any practice.

A litigant has an obligation to locate all documents that could be relevant and pass them to his solicitor who will decide whether they must be disclosed. All relevant documents must be disclosed because their existence must be revealed to the opponent. The documents must be organised and listed. The solicitor sorts out any documents that are privileged from production.

The litigant must also identify those relevant documents which were in his possession, custody or power but are no longer.

A party's bundle of documents produced at the trial is no substitute for failure to comply with requirements for discovery. Order 24 r. 16 of the Subordinate Court Rules, 1986 sets out the consequences. The consequences can be serious for both litigant and solicitor.

The absence of William Teo made no difference to the plaintiff's case. The defendant was unable to show that the learned Magistrate was wrong in his decision. The Magistrate properly gave judgment to the plaintiff in the sum of $5,109.60, costs on scale and interest at 6% from writ to judgment.

The appeal was accordingly dismissed. Costs was fixed at $1,500.

Also found at [1991] 3 CLJ 2314